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No. 96-1755

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

United States District Court,

Eastern District of California, Respondent

Blufford Hayes Jr., Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; SUPPLEMENTAL BRIEF IN OPPOSITION

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18 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

OPPOSITION TO MOTION TO FILE A BRIEF *AMICUS CURIAE* . 4

I. THERE ARE NO ISSUES OF IMPORTANT FEDERAL LAW THAT NEED TO BE DECIDED BY THIS COURT . . . 5

A. Timeliness Standards After 1989 but Before Clark . 7

II. THERE ARE NO CONFLICTS IN THE COURTS BELOW . . 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	PAGE
Barr v. Columbia, 378 U.S. 146 (1964) . . .	15-17
Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997)	6
In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993) .	7, 10, 12, 13
In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953) . .	5
Dugger v. Adams, 489 U.S. 401 (1989) . . .	14
Ford v. Georgia, 498 U.S. 411 (1991)	5
Howlett v. Rose, 496 U.S. 356 (1990) . . .	17
Johnson v. Mississippi, 486 U.S. 578 (1988) . .	17
Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993) .	6
Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996) . .	4, 6, 14
People v. Wright, 639 P.2d 267 (Cal. Sup. Ct. 1982) .	8
Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990) .	15-18
Reynolds v. Superior Ct., 528 P.2d 45 (Cal. Sup. Ct. 1974)	9
Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995) . .	6
State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975) .	16
Ulster County Court v. Allen, 442 U.S. 140 (1979) . .	9

OPPOSITION TO MOTION TO FILE A BRIEF *AMICUS CURIAE*

COMES NOW real party in interest, Blufford Hayes Jr. (hereinafter "Hayes"), by and through his counsel of record, David A. Senior, and hereby opposes the motion of the Criminal Justice Legal Foundation for leave to file a brief *amicus curiae*. The request to appear *amicus curiae* should be denied because its brief: is devoted almost entirely to issues not presented by this case; is a rehash of its support of the petition for writ of certiorari that was denied by the Court in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); and obfuscates the issues which properly are before the Court.

In the alternative, Hayes submits this supplemental brief in opposition to address the new issues argued for the first time in the brief *amicus curiae*. See Rule 15.7.

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I

THERE ARE NO ISSUES OF IMPORTANT FEDERAL LAW

THAT NEED TO BE DECIDED BY THIS COURT

Amicus curiae's brief is devoted entirely to California's habeas corpus timeliness rules.[1] While *amicus curiae*'s pride in the state's timeliness rules is well noted, as is its interest to allow California state courts the right to create, apply, modify, and define the rules over time, *amicus curiae* advocates the state's ability to thwart federal review with a state procedural rule that neither is firmly established nor regularly followed. Comity does not permit a state to trample federal constitutional rights in exchange for the promotion of *amicus curiae*'s parochial interests. Ford v. Georgia, 498 U.S. 411 (1991) ("[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." Id. at 424 (quoting James v. Kentucky,

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[1] Petitioner also seeks review of the Court of Appeals' denial of mandamus relief regarding the adequacy of California's procedural rule requiring the presentation of claims during direct appeal ("Dixon rule"). In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953).

466 U.S. 341, 348 (1984))).[2]

It is the lack of regular application of California's June 6, 1989 timeliness standards that has caused courts, including the court below, to uniformly conclude that California's timeliness rules are not firmly established and regularly followed rules. Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995); Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993); Coleman v. Calderon, No. C 89-1906 RMW (N.D. Cal. Feb. 20, 1996) (unpublished memorandum); Allen v. Calderon, No. CIV-S-88-1123 DFL-JFM-P (E.D. Cal. Sept. 30, 1994) (unpublished memorandum); Kimble v. Vasquez, No. C 90-4826 SVW (C.D. Cal. Aug. 28, 1993) (unpublished memorandum); McDowell v. Vasquez, No. 90-4009 MRP (C.D. Cal. Apr. 8, 1993)

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[2] *Amicus curiae* argues that because a state rule is created on a particular date, it is "firmly established". Conspicuously absent from this analysis is the requirement that the state procedural rule must be "firmly established **and regularly followed**". In this regard, the rule must be more than simply created, it must provide a habeas petitioner with notice and the ability to understand the rule and its potential consequences.

(unpublished memorandum); Murtishaw v. Vasquez, No. C-F-91-508 OWW P (E.D. Cal. Feb. 19, 1993) (unpublished memorandum).[3]

While *amicus curiae* contends that the Court of Appeals' opinion in this case is one of a few recent bad apples that will soon spoil the barrel, every California district court dating back to 1993 has reached the same conclusion; to wit, the California timeliness policy neither is firmly established nor regularly applied to be adequate and independent to bar federal review.

A. Timeliness Standards After 1989 but Before Clark.

An examination of California's pre-Clark[4] timeliness rule, relied upon by *amicus curiae* throughout its brief, explains the consistency of the above federal court decisions. A watershed event of sorts occurred in California habeas corpus

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[3] *Amicus curiae* hyperbolically exclaims that the Court of Appeals has disregarded all of California's procedural default rules decided prior to 1993. Brief at 3-4. While the Court of Appeals' decisions with respect to inadequacy have been consistent, the lower court only has found **one** procedural rule inadequate; to wit, California's habeas timeliness rule in effect between June 6, 1989 and July, 1993. It should be noted that *amicus curiae* later downgrades its opening bluster at footnote four of its brief.

[4] In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993).

jurisprudence on June 6, 1989. This event occurred not in the form of a statute, opinion, or rule, but rather in the form of a News Release by the Administrative Office of the Courts. This release, entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death," announced that the California Supreme Court, in an unprecedented action, was that day adopting a set of "policies" for capital appeals. Included among these "policies" was a set of Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions ("Standards"). Included in those policies were requirements pertaining to timeliness. Significantly, they were termed "timeliness standards" rather than timeliness rules. Indeed, these standards were no more precise than prior timeliness rules cited by the state courts in providing guidance to habeas petitioners.

The clear excess of the court's rule-making authority notwithstanding,[5] the Standards purported to convert California

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[5] The California legislature has granted exclusive legislative authority to prescribe rules for practice and procedure in the California courts to the Judicial Council. People v. Wright, 639 P.2d 267, 270 (Cal. Sup. Ct. 1982); Cal. Penal Code § 1247k (West 1982). "[T]he only body outside the Legislature accorded an approximation of such quasi-legislative

overnight from a "post-affirmance" habeas jurisdiction to a "unitary" habeas jurisdiction, wherein habeas corpus proceedings are litigated in conjunction with direct appeal. Without prior notice or conducting rule-making proceedings, the court imposed upon "[a]ppellate counsel in capital cases . . . a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." Standard 1-1.

A major component of the new system involved the purported clarification of an issue left unresolved by decades of decisional law: what the time limits are, if any, for filing a petition for writ of habeas corpus in state court. Unfortunately, the answer the Standards provided failed to

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rule-making competence is the Judicial Council, created by article VI, section 6, of the California Constitution and empowered thereby, inter alia, to 'adopt rules for court administration, practice and procedure, not inconsistent with statute.'" Reynolds v. Superior Court, 528 P.2d 45, 55 n.23 (Cal. Sup. Ct. 1974).

There is no evidence or authority that the Judicial Council has prescribed the timeliness rules referred to by *amicus curiae*. Instead, it is clear that these rules and/or policies were promulgated by the California Supreme Court. Therefore, these "rules" simply are the result of an impermissible exercise of judicial authority, and in reality, are not in fact state law.

The state court must actually have a clearly applicable state procedural rule upon which its default is premised. Ulster County Court v. Allen, 442 U.S. 140, 150 (1979). Absent the existence of such a rule, as in this case, the state court's order is inadequate to bar federal review. Id.

illuminate.

Eschewing all objective criteria, the Standards simply provided that habeas corpus claims must be investigated and presented "without substantial delay." Standard 1-1. In their original form, the Standards also provided that petitions filed within 60 days of the appellate reply brief presumptively are without substantial delay.[6] Standard 1-1.1. "Substantial delay" was to be gauged with respect to the date upon which "petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis of the claim." Standard 1-1.2.[7] The absence of "substantial delay" was equated with a "reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim . . . ." Standard 1-1.2. Finally, the court rather enigmatically announced that any petitions filed thereafter "may be" denied as untimely. Standard 1-1.3.

The presumption that petitions filed within 60/90 days

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[6] A September 1990 amendment increased this period to 90 days. The court never has explained the reason for this increase.

[7] In 1993, this factual notice provision was changed to "knew, or should have known." See In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993) (Appendix to Opinion).

after the final due date for the filing of appellant's reply brief are timely was meaningless in a great number of cases, including Hayes', because the 60/90-day period had passed prior to the Standards being issued. Petitioners in this situation, according to the Standards, could still establish an absence of substantial delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2. Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 . . . the petition was filed within a reasonable time after that date." Standard 1-1.3.

For petitioners unable to demonstrate lack of substantial delay in either of these two ways, the court required petitioners to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2. Failing that, the court warned, petitions "may be denied as untimely." Standard 1-3.

In sum, then, the 1989 Standards: (1) established a

time period of presumptive timeliness; (2) offered two ways in which petitions filed after that time period still could be timely; (3) stipulated a good cause requirement for untimely petitions; and (4) gave the court discretion to deny untimely petitions lacking good cause.

In July 1993, after four years of experience failed to endow any articulable timeliness criteria on the standards, the California Supreme Court conceded their vague and arbitrary application. In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993). The Clark court's review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to the following conclusion: "no clear guidelines have emerged in our past cases." Id. at 737 (emphasis added). The state court announced substantial revisions to the Standards in July 1993, reprinted as an appendix to the Clark opinion.

While the policies provided no basis for uniformity in application, they did provide the predicate for subsequent uniformity of the federal courts' opinions and orders, as well as an admission by the California Supreme Court, that the 1989 Standards' timeliness rules were not firmly established and

regularly followed.[8]

In summary, the 1989 timeliness Standards acquired the characteristics of a "know it when you see it" policy, which California certainly is entitled to have and use as its state courts see fit; however, the lack of consistent application renders it inadequate to bar federal review.

II

THERE ARE NO CONFLICTS IN THE COURTS BELOW

Amicus curiae argues that certiorari should be granted to resolve a purported inter-circuit conflict that there is uncertainty with respect to whether an adequate state procedural rule requires that it must be regularly followed in habeas cases. Petitioner unsuccessfully proffered this argument to this Court

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[8] *Amicus curiae* argues that the Court of Appeals "has failed to consider the unique nature of timeliness rules . . . ." Brief at 5. In fact, not only has the Court of Appeals noted the uniqueness of the rule, so too has the California Supreme Court in concluding that the rules have established no clear guidelines. In re Clark, 855 P.2d 729, 737 (Cal. Sup. Ct. 1993). *Amicus curiae* proffers that a timeliness rule serves a purpose similar to a statute of limitations - to guard against the presentation of stale claims; yet it fails to acknowledge that the uniqueness of California's timeliness rule provides that it "cannot fairly be analogized to a statute of limitations". Id. at 759 n.30.

in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996). Now *amicus curiae* is playing this tune, but never actually identifies the conflict.

Amicus curiae correctly notes that this Court already has held, in a habeas corpus case, that an adequate state rule used to bar federal review must be consistently or regularly applied. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989). The Court's application of the "consistently applied" and "regularly followed" standard in Dugger has created a uniform application of this adequacy test by all lower courts. In this regard, and consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default.[9] No circuit ever has rejected consistency of application as a test of adequacy.

In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts' understanding and application of this adequacy test.

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[9] Hayes cited these cases at page 10 of his opposition to the petition for writ of certiorari.

Amicus curiae argues that the instant case is distinguished from Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990) by its alleged contrary result. *Amicus curiae* is, quite simply, wrong. Prihoda involved a very different set of legal and factual issues, ones not present in this case.

The issue in Prihoda was whether the mere existence of a "good cause" exception to a clear state procedural requirement automatically violated the "strict adherence" formulation of the adequate and independent state ground doctrine articulated by Barr v. Columbia, 378 U.S. 146 (1964). The petitioner in Prihoda had violated the straightforward state-law procedural requirement, contained in Wisconsin Statute section 974.06(4), that "all grounds for relief available to a prisoner . . . must be raised in his original, supplemental or amended motion [for collateral relief]." Prihoda v. McCaughtry, 910 F.2d at 1381. The petitioner's second motion for collateral relief was denied on procedural grounds, notwithstanding petitioner's contention that his pro se status during the prior proceeding constituted "good cause" for a successive motion for collateral relief.

In the Seventh Circuit, the petitioner relied on Barr v. Columbia, 378 U.S. 146 (1964) to argue that the existence of a "good cause" exception to the rule rendered its enforcement

insufficiently "strict" to constitute an adequate and independent state ground for decision. In the alternative, petitioner set forth a single example from ten years earlier, State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975)(a second motion for collateral relief was entertained partially because the first motion had been filed pro se), to attempt to demonstrate that the state court had failed to administer the exception evenhandedly.

Despite *amicus curiae*'s emphatic assertions, there is no disagreement between the Ninth and Seventh Circuits. The Seventh Circuit's general view of the adequate and independent state ground doctrine, as expressed in Prihoda, is entirely consistent with the Ninth Circuit's:

> A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted.

Prihoda, 910 F.2d at 1383 (citing Johnson v. Mississippi, 486 U.S. 578 (1988); Barr v. Columbia, 378 U.S. 146 (1964); Howlett v. Rose, 496 U.S. 356 (1990)). Furthermore, there is nothing in the instant case, or other Ninth Circuit cases, that suggests the slightest disagreement with Prihoda's view that "[a] rule of forfeiture-unless-good-reasons may be 'strictly' followed when the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Id. at 1384.

Hayes demonstrated in the district court (as well as in his Brief in Opposition filed in this Court) that the routine practice of the California Supreme Court was to treat all petitions involving the circumstances of the instant case as timely filed. Unlike the Prihoda petitioner's reliance on a single deviation from the state-court rule (based only in part on his own similar circumstances), Hayes' showing is supported by an examination of California Supreme Court rulings in every state court petition filed under similar circumstances. That showing led below to the inescapable conclusion that the state court's application of the timeliness guidelines was entirely without rhyme or reason.

Consequently, leave to file the brief *amicus curiae*

should be denied. In the alternative, the Court should reject the arguments of *amicus curiae* by denying the petition for writ for certiorari.

CONCLUSION

For the foregoing reasons, real party in interest Blufford Hayes Jr. respectfully submits that the motion of the Criminal Justice Legal Foundation for leave to appear *amicus curiae* be denied, or in the alternative, that its arguments should be rejected with a denial of the petition for writ of certiorari.

DATED: June 17, 1997

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1801 Century Park East, 26th Floor, Los Angeles, California 90067.

On June 17, 1997, I served the foregoing document (s) described as REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; SUPPLEMENTAL BRIEF IN OPPOSITION on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

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[X] (By Mail): I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California n the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more that one day after deposit for mailing in affidavit.

[ ] (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 17, 1997, at Los Angeles, California.

Michelle Raluy

MICHELLE RALUY